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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1210

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (App. 63–69) is reported at 365 F. Supp. 609. The Interstate Commerce Commission's Service Order No. 1134 (App. 15–18) is unreported.

JURISDICTION

The opinion and judgment of the three-judge district court was entered on October 18, 1973. A Notice of Appeal was filed by the Interstate Commerce Commission on December 14, 1973 (App. 72–73). The appeal was docketed on February 7, 1974. Probable jurisdiction was noted by the Court on April 29, 1974.

The jurisdiction of this Court rests on 28 U.S.C. 1253. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 442.

QUESTION PRESENTED

Whether the lower court erred in holding that the circumstance that certain carrier practices directly affecting car utilization are embodied in their tariffs and affect the charges paid by shippers, thereby deprives the Interstate Commerce Commission of the power to issue a car service order under Section 1(15) of the Interstate Commerce Act, temporarily suspending that practice, as an emergency measure to alleviate a critical freight car shortage.

STATUTE INVOLVED

Section 1(15) of the Interstate Commerce Act, 49 U.S.C. § 1(15), provides:

> Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (App. 70–71) vacating and setting aside a car service order issued by the Inter-

state Commerce Commission pursuant to its emergency powers under Section 1(15) of the Interstate Commerce Act.

A significant percentage of lumber is moved to market by a process known as wholesalers' sales-in-transit. The shippers' loaded boxcars are sent to hold points, there to await reconsignment orders upon final sale to the wholesalers' customers. The tariffs allow indefinite holding, subject to demurrage charges for detention in excess of 24 hours. The demurrage charges, however, have never resulted in discouraging shippers from lengthy holding of cars, and in 1973 during a period of transportation emergency caused in large measure by the unexpected requirements of the Russian grain movement, field reports of the Commission staff disclosed excessive and growing delays in reconsignment at the various hold points.

To alleviate the degree of car shortage caused by excessive delay in reconsignment, the Commission isued Service Order No. 1134, *Lumber and Plywood—Restrictions on Reconsigning.* (App. 15). The service order limited the hold time at reconsignment points to five days (120 hours), exclusive of Saturdays, Sundays, and holidays. If the lumber cars are held at reconsignment points longer than five working days, the reconsignment privilege would no longer obtain and the shippers would be subject to local or joint tariff rates from the point of origin to the hold point, and from the hold point to the ultimate destination.

In setting aside the order, the district court held the Commission to be without Congressional authority to enter such an order under Section 1(15). (App. 69).

A. BACKGROUND

As this Court is well aware, the Nation presently faces a chronic shortage of railroad boxcars, *United States* v. *Florida East Coast R. Co.,* 410 U.S. 224, 230. Despite various regulatory efforts,[1] the Nation's present freight car fleet is inadequate to meet today's needs. The Commission[2] and Congress[3] have long

[1] In an effort to ameliorate the effects of the boxcar shortage the Commission has moved on a number of related fronts, establishing a new schedule of payment for the use by one railroad of another's cars—"basic per diem", *Chicago, B. & O. R. Co.* v. *New York S. & W. R. Co.*, 332 I.C.C. 176, sustained on review *sub nom. Union Pacific R. Co.* v. *United States*, 300 F. Supp. 313 (D. Neb. 1969), and *Boston & Maine Railroad* v. *United States*, 297 F. Supp. 615 (D. Mass. 1969), *aff'd per curiam* 396 U.S. 29; adding an "incentive" element to the basic per diem to encourage the prompt return of equipment found to be in short supply, *Incentive Per Diem Changes*—1968, 337 I.C.C. 183 and 217, *sustained sub nom United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224, and *Florida East Coast Ry. Co.* v. *United States*, 368 F. Supp. 1009, aff'd, —— U.S. ——, and requiring that unloaded freight cars be returned with or without a load in the direction of the owning line, *Investigation of Adequacy of Freight Car Ownership*, 355 I.C.C. 264, 335 I.C.C. 874, sustained sub nom. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742.

[2] See, e.g. *Car Service, Freight Cars*, 268 I.C.C. 687 (1947); *Car Supply Investigation*, 42 I.C.C. 657 (1917); *Car Shortages—Insufficient Transportation Facilities*, 12 I.C.C. 561 (1907).

[3] Congress is similarly concerned with the problems of car supply. See, e.g., S. Rep. 386, 89th Cong., 1st Sess. (1965); S. Rep. 445, 87th Cong., 1st Sess. 720 (1961); S. Rep. 452, 86th Cong., 1st Sess. (1959).

More recently the Senate passed on July 23, 1973, Senate Bill

wrestled with the problem of car supply to little avail. The shortage remains, and correspondingly, the Commission's ability to direct effective use of the Nation's limited rail resources through service orders has become a matter of major, and increasing, importance.

The present case arises out of an emergency situation over and above the chronic freight car shortage. In early 1973 a combination of forces created a transportation emergency calling for immediate Commission action. Thus, a booming economy, the financial inability of a significant segment of the rail industry to add to the boxcar fleet, and the completely unexpected demands made on the Nation's overall transportation resources by the Russian grain sales, combined to place an unsustainable strain on the Nation's freight car fleet. In this crisis situation, the Commission, in addition to the general measures described *supra* at fn. 1, designed to ameliorate the chronic freight car shortage, also moved against specific practices of various industries which were exacerbating the problem. Thus, to ensure that small as well as large grain shippers would have access to the most efficient jumbo covered hopper cars, the Commission in Service Order No. 1120 placed a restriction on the number of such cars that could be used in unit-train service on grain. To

S. 1149 which is intended to "increase the Supply to Meet the Needs of Commerce, Users, Shippers, National Defense. and the Consuming Public". S. Rep. 93–303, 93rd Cong., 1st Sess.

S. 1149 was later incorporated in S. 2767, the Senate's version of the Regional Rail Reorganization Bill. Upon conference, however, the provisions of S. 1149 were deleted and the problems of boxcar supply were made a priority order of business for the 93rd Cong. 2d. Sess.

alleviate the congestion and delays at ports resulting from the arrival of the unprecedented volume of grain, the agency in Service Order No. 1121 reduced the free-time period on boxcars and covered hoppers held at port from the existing five-and-seven-day period to three days. And, to provide additional equipment for the Russian grain movement, the Commission by Service Order No. 1117 permitted the diversion of open-top hopper cars away from the coal movement for which they are normally used to the grain trade. (App. 53–55)

It was against this background that the Commission viewed the practice of using boxcars as mobile lumber warehouses for longer and longer periods as adding to the overall rail emergency. It was also against this background that the Commission was compelled, once again, temporarily to suspend the impediment to the most efficient use of the scarce boxcar fleet during a transportation emergency caused by a misuse of reconsignment by lumber wholesaler/shippers.

Reconsignment privileges, as involved in this case, differ markedly from so-called transit privileges which this Court recently considered in *Atchison, T. & S.F.R. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800. Transit privileges generally allow the stopping of a shipment en route to enable some process or operation to be performed on the goods, and the reshipping to final destination at the through rate applicable from the original shipping point to destination. Reconsignment, on the other hand, allows stopping in, or interruption of the through movement merely to change the destination or billing of a shipment en route, and no operation is

performed on the goods. Under the applicable car service rules, indefinite or open-ended holding is permitted at reconsignment points. Other than shippers of perishable commodities seeking a market, reconsignment is principally used by lumber wholesalers or brokers who set their lumber in motion before they have a purchaser. See Locklin, *Economics of Transportation* (7th Ed. 1972) pp. 602–03; see also App. 60.

Reconsignment privileges have been available since the earliest days of railroad regulation, *Reconsignment Case,* 47 I.C.C. 590 (1917), and lumber wholesalers, such as appellees, have long used boxcar storage pending reconsignment as a marketing substitute for the warehousing or storage function normally performed by wholesalers. *Edward Hines Trustees* v. *United States,* 263 U.S. 143, 146.

The Commission outlined the whole process of lumber marketing in *American Wholesale Lumber Asso.* v. *Director General,* 66 I.C.C. 393 (1922). There are two kinds of lumber mills. The large mills operate large tracts of lumber over a period of years, have large storage yards, and often their own sales force. Small mills, on the other hand, are "portable," lack storage facilities, and use the wholesalers to market their lumber.

Under the sales-in-transit technique the smaller mills, through the wholesalers, directly load the lumber cars and send them toward reconsignment points, there to await sale to a purchaser. The lumber wholesalers' storage function is thereby bypassed, and the boxcars serve as lumber warehouses. As the Commission pointed out in *American Wholesale Lumber Asso., supra,* this technique inevitably results in detention of some cars (*Id.* at 407):

> It may properly be pointed out that the placing of shipments in transit with the intention of selling them while they are on the rails of the carriers inevitably results in detention to some cars. The small mill is constantly tempted to put cars on the rails to secure an advance from the wholesaler, even though trade conditions are such that there is no possibility of disposing of the lumber within a reasonable time after the cars reach the hold point. When the shipment reaches the hold point and the market is rising, the wholesaler has an incentive to hold the shipment awaiting further advance in price. On a falling market the consumer defers purchase.

The practice of mobile warehousing is, in any circumstance, wasteful of transportation resources. During normal times, it has traditionally been tolerated, simply as an accommodation to the companies accustomed to handling their business in this fashion. But in times of severe transportation emergency, the habits of one industry cannot be permitted to override the critical needs of all other shippers, and the Commission has never hesitated to issue service orders, such as the one at bar, when emergency conditions required it. Thus, for example, during the post World War II period the Commission found it necessary to direct an order identical to the one at bar, against the lumber industry, limiting reconsignment on lumber and plywood shipments to 48 hours, with the sum of the local rates to apply if the cars were held for a longer period. Service Order No. 692 (1947), 12 F.R. 1685.

Later, during the Korean War, the Commission issued another car service order in the same form, limiting hold time to three working days, and subjecting the lumber shippers to the sum of the local rates if the cars are held for a longer period. Service Order No. 858, 15 F.R. 5050.[4]

Similarly, during the post World War II adjustment period, it issued a service order which, among other things, limited reconsignment on shipments of perishables to two days, with the sum of the local rates to apply if the cars were held for a longer period. Service Order No. 396, sustained *sub nom. Iversen* v. *United States,* 63 F. Supp. 1001 (D.D.C. 1948, three-judge court), aff'd. *per curiam* 327 U.S. 761, rehearing denied 327 U.S. 819. Moreover, in extreme situations the Commission has even suspended the reconsignment practice altogether during transportation emergencies, e.g., Service Order No. 207 1944), 9 F.R. 5316; Service Order No. 280 (1945), 10 F.R. 1459; Service Order No. 305 (1945), 10 F.R. 5651. See also Service Orders Nos. 115, Amendment 2, (1943), 8 F.R. 13262, and 160 (1943), 8 F.R. 14223, where the Commission held shippers subject to the sum of the local rates without reserving any hold time privileges whatsoever.

It was against this background that the Commission approached the problem created by excessive delays on reconsignment during the 1972–73 freight car crisis.

[4] Service Order Nos. 692 and 858 were not located by Commission counsel until after the lower court had issued its opinion. The orders thus were not before the Court when it found (App. 65) that no such order had ever before been issued by the agency. These orders are attached as Appendix A.

B. ACTION TAKEN BY THE COMMISSION

By early 1973, the average daily shortage of 40-ft. wide-door, plain boxcars was 651 cars; of 50-ft. plain boxcars it was 2,234 cars. These are the cars most commonly used for loading lumber, plywood and related products. (App. 61). At the same time, field reports revealed that the average detention of cars of lumber and plywood at hold points was approximately ten days, and individual car delays of twenty to thirty days were frequently found (App. 60).

Determining that the acute car shortage was being exacerbated by the practice of excessive holding of lumber cars at reconsignment points, and that "such practices immobilize large numbers of freight cars needed by shippers for the transportation of other freight" (App. 15), the Commission, invoking its emergency powers, issued Service Order No. 1134.

The service order limited hold time at reconsignment points to five working days. It did not eliminate holding privileges entirely, as it could have. Only if the shipper held the car at the reconsignment point for more than five working days did he become subject to the sum of the local rates from origin, to hold point, to destination.

Thus, as long as the shipper sought only transportation and reasonable reconsignment services, there was no change whatsoever in the charge he must pay. Only when he used the boxcar, not for transportation but for warehousing, did the service order have any effect at all on his total bill. And considering the overriding need for freeing up scarce boxcars during the emergency, any additional charges paid for using the

cars as warehouses represented a *pro tanto* failure of the purpose of the order.[5]

C. DECISION OF THE COURT BELOW

Service Order No. 1134, served May 8, 1973, was to take effect on May 15, 1973. Instead of following the proper procedure of petitioning the Commission to reconsider its order,[6] the plaintiffs mounted their judicial attack on the effective date of the order.

After oral argument, the district court denied plaintiffs' motion for a temporary restraining order citing the "greater likelihood of irreversable harm by granting a temporary restraining order than by denying one." (App. 29).

After the subsequent hearing on the merits, however, the three-judge court set aside and vacated the service order. The lower court held principally that the order did not "purport to suspend any rule, regulation or practice then established in connection with car service," but rather "condoned" boxcar warehousing albeit at a higher rate (App. 68). The lower court also found expressed authority for "fixing shipping

[5] In this respect the Commission's rationale behind Service Order No. 1134 is similar to that underlying its action reviewed in *Atchison, T. & S.F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800. There the Commission's order, which allowed the railroads to impose an additional charge for in-transit inspection of grain, was not designed primarily to increase the carriers' revenue, but rather to provide an incentive to keep the scarce boxcars moving as transportation vehicles.

[6] See *United States* v. *Southern Railway Company*, 364 F. 2d 86, 91-93 (5 Cir.), *cert. den.*, 386 U.S. 1031; *United States* v. *Southern Railway Company*, 380 F. 2d 49, 54 (4 Cir.). The United States and the Commission did not raise this defense below, and are not raising it here.

rates and charges during a declared emergency under § 1(15) . . . utterly lacking. ." (App. 68). Finally, the court concluded that Service Order No. 1134 was a "rate fixing" order "developed through procedures lacking in due process." (App. 69).

SUMMARY OF ARGUMENT

1. Section 1(15) of the Interstate Commerce Act gives the Commission sweeping powers to issue car service orders when it is of the opinion that a transportation emergency exists. The Commission's service order authority pertains especially to the use made of vehicles of transportation. One of the major misuses of freight cars which the Esch Car Service Act (the origin of section 1(15)) addressed is the use of freight cars as warehouses.

Perceiving an emergency situation on top of the already chronic freight car shortage (a finding which the lower court did not dispute), the Commission issued a series of service orders. As pertinent here, it found that the excessive holding of lumber cars in transit was exacerbating the transportation crisis. Service Order No. 1134 was aimed at this use—or rather misuse—of the Nation's scarce boxcar fleet.

Service Order No. 1134 limited the hold time at reconsignment points to five working days. Since it did not eliminate hold time altogether, but rather, during the transportation emergency, left shippers the option of reconsigning their cars in a reasonable time period, Service Order No. 1134 cannot be held to be such a permanent rate order as to call into play the usual rate regulation procedures. Service Order No. 1134

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temporarily suspends the open-ended reconsignment rule in order to facilitate a more efficient use of the boxcar fleet and, as such, is fully in harmony with the Commission's car service authority.

2. Moreover, the foundation for the lower court's opinion is faulty. The lower court held that the Commission misused its section 1(15) authority because Service Order No. 1134 does not purport to suspend "any rule, regulation or practice then established in connection with car service." (App. 68). But the weight of authority holds that since section 6 of the Interstate Commerce Act, 49 U.S.C. 6, requires the filing of tariffs including rates and charges and "any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares, and charges," topics such as hold time limitation and accelerated charges for holding beyond the limited periods, both of which affect the aggregate of rates and charges, are "rules" within the contemplation of section 1(15)(a). Similarly, the lower court found no expressed authority "for fixing shipping rates and charges during a declared emergency under § 1(15)" (App. 68). This position also has been negated by the weight of authority holding that the Commission can temporarily effectively increase transportation charges to reach car service goals in emergencies.

3. The limitation imposed by the lower court on the Commission's emergency car service powers is particularly inappropriate in the current era of chronic freight car shortage. Since the freight-car fleet is inadequate to meet the present needs of the Nation, the

Commission must be left with a full array of remedial car service measures to direct the maximum transportation use of the boxcar fleet in the public interest during times of transportation emergency. This includes the power to devise remedial measures tailored to those situations where misuse of existing rules regarding the use of cars exacerbate overriding transportation emergencies.

ARGUMENT

SERVICE ORDER NO. 1134 WAS WELL WITHIN THE COMMISSION'S EMERGENCY AUTHORITY AND WAS RATIONALLY DESIGNED TO MEET A TRANSPORTATION CRISIS

A. SECTION 1(15) CONFERS BROAD AUTHORITY ON THE COMMISSION TO ISSUE ORDERS, IN EMERGENCY SITUATIONS, AFFECTING THE USE TO WHICH CARS ARE PUT

Section 1(15) of the Interstate Commerce Act, 49 U.S.C. 1(15), authorizes the Commission "with or without notice, hearing, or the making or filing of a report" to issue car service orders "[w]henever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists." That the Commission's authority is as sweeping as the literal language of the statute suggests can scarcely be questioned. As Mr. Justice Holmes stated in *Avent* v. *United States*, 266 U.S. 127, 130:

> The statute [now 1(15)] confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed.

The broad car service discretion vested in the Commission is confirmed by the legislative history of the *Esch Car Service Act,* 40 Stat. 101. See, e.g., H.R. Rep. 18, 65th Cong., 1st Sess. 7 (1917); S. Rep. 43, 65th Cong., 1st Sess. 2 (1917). Enactment of the Esch Car Service Act[7] was prompted by the severe car shortage that plagued the Nation during the World War I period. As a result of its investigation of the then-current freight car shortage (*Car Supply Investigation,* 42 I.C.C. 657), the Commission recommended to the Congress the enactment of remedial car service legislation. *30th Annual Report* 73–74, 91–92 (1916). The measures approved by Congress followed substantially the form recommended by the Commission. *31st Annual Report* 65 (1917). With the broadening of the Commission's powers enacted as part of the Transportation Act of 1920,[8] H.R. Rep. 456, 66th Cong., 1st Sess. 17, 27 (1919), the Esch Act's provisions are continued in sections 1(10)–(17) of the Interstate Commerce Act, 49 U.S.C. 1(10)–(17).

Under the Esch Act, while the Commission was given broad powers to correct problems of rail car shortage (55 Cong. Rec. 2021, 2022), the Commission's

[7] The legislative history of the Esch Car Service Act is found in 64th Cong., 2d Sess., H. Rep. 1553; 65th Cong., 1st Sess., H. Rep. 18; 65th Cong., 1st Sess., S. Rep. 43; 55 Cong. Rec. 2018–29, 2631–2, 2699–2701, 2823–4, 2857. Regarding the amendments made by the Transportation Act of 1920, see 66th Cong., 1st Sess., H. Rep. 456, p. 17; 58 Cong. Rec. 8315–6, 8529–31; 59 Cong. Rec. 3263.

[8] For a convenient statement of the legislative history of the portion of the Transportation Act of 1920 which broadens the Commission's car service authority, see *Peoria Ry. Co.* v. *United States*, 263 U.S. 528, 533, fn. 7.

essential duty was to assure that the railroads "used their present equipment systematically and so as to get from it the amount of service of which it is capable." S. Rep. No. 43, 65th Cong. 1st Sess. 4. In short, the concern of Congress was that the railroads utilize their present equipment more effectively and efficiently, rather than necessarily acquire additional equipment to relieve car shortages.

The use of freight cars as warehouses—the subject of Service Order No. 1134—was one of the main evils sought to be remedied by the original car service legislation. The debates in Congress clearly disclose that the practice of shippers using cars for storage rather than for transportation was regarded as one of the chief causes of the freight car shortage, which Congress intended the statute to reach.

In this connection, Mr. Esch, the sponsor of the legislation, declared (55 Cong. Rec. 2020–2021):

> Another cause of car shortage is the holding of cars on the part of shippers themselves, using the car as a species of warehouse, instead of promptly unloading it. I think that it is quite a universal evil throughout the United States, but it is due in some measure to the lack of warehouse and elevator facilities at the terminals. * * *
>
> Mr. MADDEN. If the gentleman will yield to me, I would like to ask him one question. I would like to ask the gentleman if there is any provision in this bill to compel railroad companies to pay demurrage to the shippers in case they failed to furnish the cars within the time they were required for the shipment of the goods?

Mr. ESCH. The gentleman means reciprocal demurrage?

Mr. MADDEN. This gives the Interstate Commerce Commission the right to authorize them to charge certain demurrage of the shipper if he fails to unload the car. Ought not the shipper to have a claim against the railroad company in case they fail to furnish the cars?

Mr. ESCH. I have no doubt under the proposed amendment, in case of emergency, the Commission could make any rules or regulations that they saw fit that would promote the transit of freight, because the power is very broad, and necessarily so.

The concern that the Commission have sufficient power over the use of cars is emphasized in the Transportation Act of 1920.[9] There the term "car service"

[9] Thus, as Congressman Esch, Chairman of the House Committee on Interstate and Foreign Commerce, one of the chief sponsors of the legislation, stated in discussing the bill (H.R. 10453) on the floor of the House (58 Cong. Rec. 8315–16):

"Then we have in title 2 * * * a very material amendment to the car-service act. The car-service act was passed about May 1917, just too soon to become fully operative before Federal control began, so that the act has never had a fair chance of demonstrating its efficacy in the matter of car service. In the form in which we passed the act some two years ago it related only to the exchange, interchange and return of cars. We have enlarged that jurisdiction by saying that now the authority of the Commission shall include the use—note the force of every word:

"The term 'car service' in this act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives—"

That was not in the old act—"cars, and other vehicles"—

Which was not in the original act—"used in the transportation of property."

See also H.R. Rep. No. 456, 66th Cong., 1st Sess. 17 (1919).

was expressly defined to include the "use . . . of locomotives, cars, and other vehicles" (49 U.S.C. 1(10)).

That the Commission's car service authority extends to the "use" of cars was specifically recognized by the Court in *Peoria Ry.* v. *United States,* 263 U.S. 528. In that case, this Court clearly stated that " 'car service' connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them." (*Id.* at 533).

In its opinion, the lower court restrictively read this Court's opinion in *Peoria* to stand for the proposition that the "sole purpose" of 1(15)(a) and (b) is "to make [railroad cars] available in emergencies to a carrier other than the owner" (App. 68). But in *Peoria* the question presented was whether the Commission was authorized under its 1(15) emergency powers to issue orders compelling a terminal carrier to switch, by its own engines and over its own tracks, freight cars tendered by another carrier.[10] The appellant in *Peoria* conceded that the Commission's emergency powers apply to "the use to be made of railroad property," but argued that "no such authority is granted to require performance of a transportation service." (Id. at 532). This Court agreed, holding that 1(15) does not give the Commission authority to direct one carrier to perform switching services for another. It was in this sense that "transportation service"—here the performance of a switching service for another carrier—was held to be beyond section 1(15)'s reach. But the holding in no way negates the Commis-

[10] See *United States* v. *Michigan Cement Co.,* 270 U.S. 521, 527.

sion's broad discretion over the use of cars, as this Court recognized.

The lower court's further conclusion that this situation does not involve the "use . . . of . . . cars . . . by any carrier by railroad," within the meaning of Sections 1(10) and 1(14) on the theory that the misuse of reconsignment is a "use" of the cars by the shippers, rather than by the railroad, is a mere quibble over semantics. The end result is that the railroads here are "using" the cars to hold goods for excessive periods awaiting reconsignment, and the fact that this is done at the direction of the shipper does not change that result. And in any event it is clear that the Commission has the power, under Section 1(15), to direct its car service orders to shippers, as well as to railroads. See, *e.g., Reading Company* v. *Commodity Credit Corp.,* 289 F. 2d 744, 748 (3 Cir. 1961).

In *Turner Lumber Co.* v. *C. M. & St. P. Ry.,* 271 U.S. 259, 262, this Court again emphasized that the Commission has broad powers to secure the efficient use of freight cars. Moreover, the Court additionally stated that undue detention of cars for storage is properly subject to remedial action:

> The efficient use of freight cars is an essential of an adequate transportation system. To secure it, broad powers are conferred upon the Commission. Compare *United States* v. *New River Co.,* 265 U.S. 533; *Avent* v. *United States,* 266 U.S. 127; *United States* v. *P. Koenig Coal Co.,* 270 U.S. 512. One cause of undue detention is lack of promptness in loading at the point of origin or in unloading at the point of destination. Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper to so use freight cars is obviously beyond the ordinary duties of a carrier * * *.

As *Turner Lumber* shows, the problem of undue detention by lumber shippers at reconsignment points is not a new one. The abuse of the lumber sales in transit practice has periodically created transportation emergencies calling for immediate action on the part of the Commission, including, as discussed *supra* at pp. 9–10, orders limiting reconsignment to a specific number of days.

We submit that Service Order No. 1134, which is designed to correct a specific misuse of boxcars by lumber shippers, is well within the Commission's authority to issue orders affecting the use to which cars are put. And, as we shall demonstrate, the mere fact that an incidental effect of the order may be to require a shipper who chooses to make excessive use of the boxcars for warehousing purposes to pay a higher rate in no way invalidates the order.

B. THE FACT THAT SERVICE ORDER NO. 1134 SUSPENDED A CAR SERVICE RULE THE EFFECT OF WHICH MAY BE TO CHANGE THE BILL A SHIPPER MUST PAY IF HE CHOOSES TO USE HIS LOADED BOXCAR AS A WAREHOUSE, DOES NOT INVALIDATE THE SERVICE ORDER, NOR DOES IT CHANGE ITS NATURE

The lower court's conclusion that Service Order No. 1134 is a rate order developed through procedures lacking in due process is based on two faulty prem-

ises: (1) that Service Order No. 1134 "does not purport to suspend any rule, regulation or practice then established in connection with car service" (App. 68); and (2) that "[e]xpressed authority to the Commission for fixing shipping rates and charges during a declared emergency under § 1(15) is utterly lacking and none can be rationally inferred or implied from the express language." (App. 68). Both bases for the court's conclusion are erroneous.

First, as to whether the service order suspended a car service practice or rule, we have shown earlier that the Commission's car service authority is particularly directed toward the use to which freight cars are put. In Service Order No. 1134 the Commission's emergency authority was exercised specifically to limit the use of lumber cars as warehouses. To reach this car service goal, the order had to suspend the practice of indefinite or open-ended holding allowed by the underlying demurrage tariffs. On a literal level, therefore, this car service practice relating to the use of the cars was the subject of, and was effectively suspended by, Service Order No. 1134.

Moreover, in the context of the Commission's emergency car service authority, it is now well settled that concepts such as "free time," hold time limits, and increased charges for holding beyond the time limits are car service "rules" within the contemplation of 1(15).

Directly in point is *Iversen* v. *United States,* 63 F. Supp. 1001, (D.D.C.), aff'd *per curiam* 327 U.S. 761, reh. den. 327 U.S. 819, where the court was faced with the question of whether terms like "free time" and the scale of demurrage charges are "rules" with

respect to the "the use, supply or movement of cars" (in other words "car service" as defined by 1(10)). *Id.* at 1003. At issue in *Iversen* were four of the Commission's service orders: two, ordering the railroads to increase their demurrage scale; one, directing the railroads to supplement their tariffs by including Sundays and legal holidays in the computation of free time on refrigerator cars; and a fourth—Service Order No. 396—employing precisely the same formulation used in the order here at issue, i.e., limiting reconsignment privilege to a specific number of days and providing that cars held in excess of that time would be subject to the sum of the local rates from origin to reconsignment point, to destination. The plaintiff in *Iversen* argued that matters such as this are not "rules" within the meaning of 1(15). The court disagreed, holding that, since section 6 of the Interstate Commerce Act, 49 U.S.C. 6, requires the filing of tariffs, including rates and charges and "any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges," items like demurrage, which affect the total transportation bill, are "rules" within the meaning of 1(15). *Id.* at 1006. It thereby sustained issuance of a service order identical to the one at bar, and the decision was thereafter affirmed by this Court.

The *Iversen* rationale, as affirmed by this Court, thereafter was specifically adopted by the Court of Appeals for the Fifth Circuit in *Armour & Co.* v. *Louisiana Southern Ry. Co.,* 190 F. 2d 925, 928 (5 Cir.), *cert. den* 342 U.S. 913. See also *Reading Company* v. *Commodity Credit Corp.,* 289 F. 2d. 744 (3

Cir. 1961), where the court upheld a service order limiting free time and accelerating demurrage charges.

It is thus clear, we submit, that when Service Order No. 1134, like the judicially-approved Service Order No. 396, suspended the tariff's open-ended reconsignment with demurrage, it suspended a "rule" established in connection with car service.

The lower court's second premise—that no power exists under Section 1(15) for the Commission to "fix" rates and charges during a declared emergency (App. 68)—is equally erroneous. In *Iversen* again, the plaintiffs argued that the term used in 1(15)(a), "rules, regulations, or practices," has no relation to the fixing of rates, fares or charges, 63 F. Supp. 1006. The court disagreed, holding valid three service orders (one in the precise form of No. 1134), which materially increased the shipper's transportation charges if freight cars were not quickly returned to the flow of commerce. Similarly, the court in *Armour & Co.* v. *Louisiana Southern Ry. Co., supra,* held that the Commission had emergency powers under section 1(15) to direct that new increased demurrage charges be placed in effect to accomplish car service goals during a transportation emergency. Indeed, even the court below in a previous three-judge review of a car service order brought by the present appellees, upheld the Commission's authority under section 1(15) to order the railroads to increase their demurrage charges during an emergency. See *Oregon Pacific Industries, Inc., et. al.* v. *United States* (Civil Action No. 69–249, D.

Ore.) and Service Order No. 1023 which it sustained."[11] It is simply too late in the day for the lower court inconsistently to assert that the Commission has no authority over shipping rates and charges under section 1(15) during a declared transportation emergency.

Thus, we submit, the two bases of the lower court's analysis are faulty, thereby erroneously leading to the conclusion that Service Order No. 1134 was issued through procedures lacking in due process.

C. THE LOWER COURT'S ACTION IN SETTING ASIDE SERVICE ORDER NO. 1134 SERIOUSLY AND UNWARRANTEDLY DIMINISHED THE COMMISSION'S EMERGENCY AUTHORITY TO DIRECT CAR SERVICE IN THE PUBLIC INTEREST

Service Order No. 1134 did not end the lumber marketing practice of sales in transit, nor did it suspend the lumber shippers' privilege of reconsignment. Rather, like the form of order approved in *Iversen, supra,* pp. 22–23, the service order merely put a reasonable time limit on the exercise of the reconsignment privilege.

In setting aside the service order as a presumably permanent rate order developed without due process, the lower court not only misconceived the purpose of No. 1134, it also cast grave doubt on the validity of this long-established form of remedial action. Any such limitation of the Commission's emergency authority should not be lightly countenanced in this period of chronic boxcar shortage.

As we have stated earlier, despite various regulatory and Congressional actions, the economy is being

[11] The orders of the Court and the Commission, which are unreported, are attached hereto as Appendix B.

restrained by a relatively inadequate boxcar fleet. Because of this underlying fact, which mirrors the situation that pertained when the original car service legislation was passed, the Commission's car service authority is a matter of critical and growing importance. The Commission must correspondingly be left with the broad car service discretion intended by Congress to direct the use of the scarce vehicles in the public interest during times of transportation emergency on top of the chronic shortage. The lower court, however, greatly limited that discretion.

The potential for abuse of the reconsignment privilege has been recognized by this Court. In *Turner Lumber Co.* v. *C. M. St. P. Ry.,* 271 U.S. 259, 262, this Court identified the "diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein" as a principal cause of undue detention of cars.

The problem of misuse of the sales-in-transit technique has continued unabated since Mr. Justice Brandeis wrote the *Turner Lumber* opinion. In the late 1950's the wholesalers abused their sales-in-transit technique by "rolling" their lumber to market over widely circuitous routes in order to obtain more time to ride the market. See *United States* v. *Union Pacific Railroad Company,* 173 F. Supp. 397 (S.D. Iowa 1959), aff'd *per curiam* 362 U.S. 327. See also Affidavit of appellees' witness (App. 47). While "slow rolling" is not an issue in the case at bar, undue detention at hold points remains an effective impediment

to the most efficient use of the boxcar fleet in a transportation emergency. And it was this impediment that Service Order No. 1134 addressed.

Service Order No. 1134 is of a type specifically tailored to meet those situations where shippers using a marketing in transit technique are excessively holding cars, contrary to the overriding public need to channel the cars back quickly into the stream of commerce. By setting limits to reconsignment privileges, the mechanism used in No. 1134 gives the Commission the means to adjust the needs of both reconsignment shippers and the shipping public generally.

Indeed, the action here taken by the Commission represents a careful accommodation of the legitimate needs of all shippers. The Commission did not, as it might have done,[12] order all reconsignment privileges terminated, with the full local or joint rates to apply when there was any interruption of the journey from origin to ultimate destination. Such a requirement, although clearly the most efficient from the standpoint of allocation of scarce transportation resources, would have imposed severe burdens on the lumber industry. At the same time, permitting the practice of mobile warehousing to continue unabated, despite the extreme transportation emergency, would accord unduly favorable treatment to one industry, at the expense of all other shippers. By permitting a reasonable five-day period for reconsignment under existing rules, and requiring a reversion to the full local or joint rates

[12] As noted *supra at* p. 10, the Commission has on occasion ordered reconsignment privileges suspended altogether during an extreme transportation emergency.

only if a shipper chooses to hold a car beyond that period, the Commission gave appropriate consideration to the needs of all shippers and its actions represented a reasonable accommodation of the diverse interests involved.

Moreover, the lower court's opinion goes far beyond a rejection of the particular accommodation here reached by the Commission. The lower court did not merely set aside No. 1134 because it thought it struck an arbitrary balance between the needs of the lumber wholesalers and the general public. Rather, the court threw out the whole adjustment mechanism altogether. This, we submit, was an unwarranted action in light of the legislative history behind the Esch Act, this Court's articulation of emergency discretion standards in the *Avent* case, and the realities of today's economy.

Service Order No. 1134 does not, as the lower court states, "deprive lumber and plywood shippers of the benefit of a long-standing railroad shipping practice." (App. 68). Sale-in-transit was not intended to be, nor was it, eliminated or suspended by Service Order No. 1134. Rather, the Commission merely imposed a reasonable time limitation on holding privileges, and thereby the exercise of reconsignment rules, during the transportation emergency. Transit lumber marketing remains a viable practice, and it and other types of transit marketing can be expected to continue in the future barring some now-unforeseen action. But at the same time, unfortunately, absent dramatic Congressional action, it appears that the chronic boxcar shortage will be with us into the foreseeable future.

In this light, the continued availability of the remedy embodied in No. 1134 is particularly needed.

The fact that the Commission did not choose to apply an available demurrage sanction (App. 65–6) in no way invalidates its choice of the previously approved formulation embodied in No. 1134. "[T]he choice of particular actions to carry out the broad policies stated by Congress" is a matter for the judgment and discretion of the Commission. *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 809.

In essence, service orders such as the one at bar are adjustment mechanisms used to balance the needs of reconsignment sellers and of the general public in transportation emergencies of differing severity. If the Commission is deprived of this regulatory tool during this time of chronic shortage, it will be materially weakened in its ability to meet present and future emergencies. Nothing in the statute, or in the legislative history of the Esch Act, compels such a drastic result. The Commission, now more than ever, needs its full arsenal of emergency authority to direct the use of the strained boxcar fleet in the public interest.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed.

Respectfully submitted,

FRITZ R. KAHN,
General Counsel,
BETTY JO CHRISTIAN,
Associate General Counsel,
CHARLES H. WHITE, Jr.,
Attorney,
Interstate Commerce Commission.

JUNE, 1974.

APPENDIX A

Title 49—TRANSPORTATION AND RAILROADS

CHAPTER 1—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

Part 95—Car Service

(Service Order No. 692)

Lumber—Restrictions on Reconsigning

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D.C., on the 6th day of March, A.D. 1947.

It appearing, that carload shipments of lumber are being held at points in the United States for diversion, reconsignment, or disposition orders, thereby impeding the use, control, supply, movement, distribution, exchange, interchange, and return of cars; the Commission is of opinion an emergency requiring immediate action exists in all sections of this country.

It is ordered, That:

§ 95.692 *Lumber—Restrictions on Holding for Diversion, Reconsignment or Disposition.*

(a) *Definition.* The term "lumber" as used in this order means lumber, veneer or forest products as listed in Items 26715 to 27135, inclusive, of Consolidated Freight Classification No. 17, supplements thereto or reissues thereof.

(b) *Holding of cars for diversion, reconsignment, or disposition orders, restricted.*

Carload shipments of lumber held in cars for diversion, reconsignment or disposition orders beyond two

days (48 hours), exclusive of Sundays and bank holidays, after the first seven a.m. (7:00 a.m.) after notice of arrival of the car at any point prior to delivery at the ultimate destination is sent or given the consignee or party entitled to receive same, and later reforwarded upon request of consignor, consignee, or owner, will be subject to the basis of charges shown in NOTE 1 of this paragraph.

NOTE 1.—The full local or joint (not proportional, reshipping or transshipping) tariff rate to the reforwarding point, plus the full local or joint (not proportional reshipping or transshipping) tariff rate from the reforwarding point, in effect on the date of shipment from point of origin, plus all other applicable charges previously or subsequently accruing.

(c) *Application* (1) The provisions of this order shall apply to intrastate and foreign shipments as well as to interstate shipments transported by any common carrier by railroad subject to the Interstate Commerce Act.

(2) The provisions of this order shall not apply to carload shipments of lumber billed from the primary point of origin prior to the effective date of this order.

(3) This order shall apply to a railroad freight car loaded with lumber stopped for partial unloading at a hold or reconsigning point when the order for the "stop for partial unloading" of such car is received by the carriers subsequent to the arrival of such car at the hold or reconsigning point.

(d) *Tariff provisions suspended—announcement required.*

The operation of all tariff rules and regulations insofar as they conflict with the provisions of this order is hereby suspended and each railroad subject to this order, or its agent, shall publish, file, and post

a supplement to each of its tariffs affected hereby, in substantial accordance with the provisions of Rule 9(k) of the Commission's Tariff Circular No. 20 (§ 141.9(k) of this chapter) announcing such suspension.

(e) *Special and general permits.* The provisions of this order shall be subject to any special or general permits issued by the Director of the Bureau of Service, Interstate Commerce Commission, Washington, D.C., to meet exceptional circumstances.

(f) *Effective date.* This order shall become effective at 12:01 a.m., March 21, 1947.

(g) *Expiration date.* This order shall expire at 11:59 p.m., June 30, 1947, unless otherwise modified, changed, suspended or annulled by order of this Commission.

It is further ordered, That a copy of this order and direction be served upon each State railroad regulatory body, upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement, and upon all other railroads not parties to that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Division of the Federal Register.

(40 Stat. 101, Sec. 402; 41 Stat. 476, Sec. 4; 54 Stat. 901; 49 U.S.C. 1 (10)–(17)).

By the Commission, division 3.

[SEAL] W. P. BARTEL, *Secretary.*

Title 49—TRANSPORTATION AND RAILROADS

CHAPTER I—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

Part 95—Car Service

Service Order No. 858

Lumber—Restrictions on Reconsigning

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D.C., on the 2nd day of August, A. D. 1950.

It appearing, that carload shipments of lumber are being held at points in the United States for diversion, reconsignment, or disposition orders, thereby impeding the use, control, supply, movement, distribution, exchange, interchange, and return of cars; the Commission is of opinion an emergency requiring immediate action exists in all sections of this country.

It is ordered That:

§ 95.858 *Lumber—Restrictions on Reconsigning.*

(a) *Definition.* The term "lumber" as used in this order means lumber, veneer or forest products as listed in Items 26715 to 27135, inclusive, of Consolidated Freight Classification No. 19, supplements thereto or reissues thereof.

(b) ***Holding of cars for diversion, reconsignment, or disposition orders, restricted.***

Carload shipments of lumber held in cars for diversion, reconsignment, or disposition orders beyond three days (72 hours), exclusive of the holidays listed in Item 7 of Agent B. T. Jones' Tariff I.C.C. 4257, after the first seven a.m. (7:00 a.m.) after notice of arrival of the car at any point prior to delivery at the ultimate destination is sent or given the consignee or party entitled to receive same, and later reforwarded

upon request of consignor, consignee, or owner, will be subject to the basis of charges shown in NOTE 1 of this paragraph.

NOTE 1.—The full local or joint (not proportional, reshipping or transshipping) tariff rate to the reforwarding point, plus the full local or joint (not proportional, reshipping or transshipping) tariff rate from the refordwarding point, in effect on the date of shipment from point of origin, plus all other applicable charges previously or subsequently accruing.

(c) *Application.* The provisions of this order shall apply to intrastate, interstate and foreign commerce, including commerce with insular possessions and the territories of Alaska and Hawaii.

(2) The provisions of this order shall not apply to carload shipments of lumber billed from the primary point of origin prior to the effective date of this order.

(3) This order shall apply to a railroad freight car loaded with lumber stopped for partial unloading at a hold or reconsigning point when the order for the "stop for partial unloading" of such car is received by the carriers subsequent to the arrival of such car at the hold or reconsigning point.

(d) ***Tariff provisions suspended—announcement required.***

The operation of all tariff rules and regulations insofar as they conflict with the provisions of this order is hereby suspended and each railroad subject to this order, or its agent, shall publish, file, and post a supplement to each of its tariffs affected hereby, in substantial accordance with the provisions of Rule 9(k) of the Commission's Tariff Circular No. 20 (§ 141.9(k) of this chapter) announcing such suspension.

(e) *Effective date.* This order shall become effective at 12:01 a.m., August 3, 1950.

(f) *Expiration date.* This order shall expire at 11:59 p.m., February 2, 1951, unless otherwise modified, changed, suspended or annulled by order of this Commission.

(g) *Reconsigning involving backhaul prohibited.* No common carrier by railroad subject to the Interstate Commerce Act shall reconsign or execute reconsigning orders when such reconsigning involves, requires or results in any backhaul, nor when such reconsigning requires or results in a car moving through or to a point where that car had previously been transported in through or continuous movement.

It is further ordered, That a copy of this order and direction be served upon each State Railroad regulatory body, upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement, and upon all other railroads not parties to that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Division of the Federal Register.

(40 Stat. 101, Sec. 402; 41 Stat. 476, Sec. 4; 54 Stat. 901; 49 U.S.C. 1(10)-(17)).

By the Commission, Division 3.

[SEAL] W. P. BARTEL, Secretary.

APPENDIX B

United States District Court for the District of Oregon

Civil No. 69-249

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN CO.; NORTH PACIFIC LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION; WESTERN RAILROAD TRAFFIC ASSOCIATION: SOUTHERN FREIGHT ASSOCIATION; AND TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS, INTERVENOR-DEFENDANTS

ORDER

Plaintiffs' motion to supplement the record made before the Commission is denied on the ground that such evidence is not relevant or material.

IT IS FURTHER ORDERED that Service Order No. 1023, as amended, revised, and corrected, is affirmed. We find there is a rational and sufficient basis in the record before the Commission for such order and that the Commission did not act arbitrarily or capriciously.

IT IS FURTHER ORDERED that plaintiffs' action is dismissed.

Dated this 11th day of May, 1970.

/s/ GILBERT H. JERTBERG,
Circuit Judge.

/s/ GUS J. SOLOMON,
District Judge.

/s/ ROBERT C. BELLONI,
District Judge.

Title 49—TRANSPORTATION

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

Part 1033—Car Service

Service Order No. 1023

Demurrage on Freight Cars

At a Session of the Interstate Commerce Commission, Railroad Service Board, held at its office in Washington, D.C., on the 2nd day of April, 1969.

It appearing, That there are acute shortages of freight cars throughout the country; that certain carriers are unable to furnish an adequate supply of freight cars to shippers located on their lines; that these shortages of freight cars are impeding the movement of many commodities; that many freight cars are held by shippers for loading, unloading, or instructions for movement, in excess of the free time periods established by the applicable demurrage tariffs; that such practices immobilize large numbers of freight cars needed by shippers for transportation of other freight; and that the existing demurrage rules, regulations and practices of the railroads are ineffective with respect to the use, supply, control, move-

ment, distribution, exchange, interchange and return of freight cars to meet the requirements of shippers. It is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1023 *Demurrage on freight cars.*

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce and obey the following rules, regulations and practices with respect to its demurrage rules, practices and charges.

(b) *Description of Cars Subject to this Order.* Except as otherwise provided in paragraphs (c), (d) and (e) herein this order shall apply to freight cars which are subject to demurrage rules applicable to detention of cars.

(c) *Exception:* The provisions of this order shall not apply to freight cars listed in the Official Railway Equipment Register, I.C.C. R.E.R. 370 issued by E. J. McFarland, or reissues thereof, as having the following descriptions and mechanical designations:

Refrigerator Cars—Mechanical Designation: RA, RAM, RCD, RS, RSB, RSM, RSTC and RSTM.

Stock Cars—Mechanical Designation: SA, SC, SD, SF, SH, SM, SP and ST.

Tank Cars—Mechanical Designation: TA, TAI, TG, TGI, THI, TL, TLI, TM, TMI, TMU, TMUI, TP, TPI, TPA, TPAI, TR, TRI, TVI, TW and TWI.

(d) *Exception:* The provisions of this order shall not apply to cars exempt from demurrage rules, regu-

lations and charges as provided in Item 30 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer.

(e) *Exception:* The charges and provisions of Rule 8, Item 935 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof, or of similar rules or items in other demurrage tariffs lawfully in effect, will remain in effect for the periods defined in such rules or items.

(f) Cars subject to Section A of Rule 7, Item 930, Section 1 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof, after expiration of free time, or without free time where none is provided, shall be subject to demurrage charges at the following rates:

$5.00 per car per day or fraction of a day for each of the first four days.

$25.00 per car per day or fraction of a day for each of the next four days.

$50.00 per car per day for each subsequent day.

(g) Cars subject to Section A of Rule 9, Item 940, Section 1 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof:

When a car has accrued four debits, a charge of $25.00 per car per day, or fraction of a day, will be made for each of the next four days or fraction of a day and $50.00 per car per day, or fraction of a day will be made for all subsequent detention.

(h) Cars subject to Items 1320, 1322, 1355, 1357, 1360, and 1362 of Section 3 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof, after expiration of free time, shall be subject to demurrage charges at the following rates:

$5.00 per car per day or fraction of a day for each of the first four days.

$25.000 per car per day or fraction of a day for each of the next four days.

$50.000 per car per day or fraction of a day for each subsequent day.

(i) Cars subject to Items 1325 and 1327 of Section 3 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof, after expiration of free time, shall be subject to demurrage charges at the following rates:

$5.00 per car per day or fraction of a day for each of the first two days.

$25.000 per car per day or fraction of a day for each of the next four days.

$5.00 per car per day or fraction of a day for each subsequent day.

(j) Cars subject to Items 1330, 1332, 1350, 1352, 1365, and 1367 of Section 3 of Freight Tariff 4–I, I.C.C. H–36, issued by B. B. Maurer, supplements thereto or reissues thereof, after expiration of free time, shall be subject to demurrage charges at the following rates:

$7.00 per car per day or fraction of a day for each of the first two days.

$25.00 per car per day or fraction of a day for each of the next four days.

$50.00 per car per day or fraction of a day for each subsequent day.

(k) *Application.* The provisions of this order shall apply to intrastate, interstate, and foreign commerce.

(l) *Regulations Suspended—Announcement Required.* The operation of all rules and regulations, insofar as they conflict with the provisions of this order, is hereby suspended and each railroad subject to this order, or its agent, shall publish, file, and post a supplement to its tariffs affected hereby, in substantial accordance with the provisions of Rule 9(k)

of the Commission's Tariff Circular No. 20, announcing such suspension.

(m) *Effective date.* This order shall become effective at 7:00 a.m., April 15, 1969.

(n) *Expiration date.* This order shall expire at 6:59 a.m., July 1, 1969, unless otherwise modified, changed, or suspended by order of this Commission.

(Secs. 1, 12, 15 and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15 and 17(2). Interprets or applies Secs. 1(10–17), 15(4) and 17(2), 40 Stat. 101, as amended 54 Stat. 911; 49 U.S.C. 1(10–17), 15(4) and 17(2)).

It is further ordered, That copies of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board.

[SEAL] H. NEIL GARSON, *Secretary.*

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